LEGISLATIVE POWER TO TAKE PROPERTY—TO LEGALIZE A NUISANCE. —The law seems to be well established in accordance with the legal maxim "private rights must yield to public convenience" to the effect that the legislative power of a government may so legalize an act which, unauthorized, would be a nuisance as to give the person suffering therefrom no right of action, *Miller* v. *Mayor of New York* (1883) 109 U. S. 385; *Railway Co.* v. *Truman* (1885) 11 A. C. 45; *Bellinger* v. *N. Y. C. Railroad* (1861) 23 N. Y. 42. Nor does the fact that the legislative intent to legalize must clearly appear, *Cogswell* v. *Railroad Co.* (1886) 103 N. Y. 10; *R. R. Co.* v. *Fifth Baptist Church* (1882) 108 U. S. 317, disturb the general proposition. The only exception seems to be where, as in several of the United States, the property of private individuals is specifically protected from injury. *Jackson* v. *Chicago* (1902) 196 Ill. 496; *Rigney* v. *City of Chicago* (1882) 102 Ill. 64; Constitution of Illinois (1870) Art. II § 13; Constitution of Georgia (1877) Art. I, § 3. In the majority of our States however this guaranty is lacking and in order to entitle the individual to compensation the State must take property or authorize such taking. If property is actually taken without compensation being provided for, then the legislature is exceeding its powers under the constitution and the act is illegal and void. The section of the New York Constitution belongs to this larger class, Art. I, § 6.

It becomes important therefore when the legislative authority in one of our States or in the United States authorizes, commands or permits an act to be done to inquire whether that act amounts to a nuisance or whether it constitutes a taking of property. This was the question necessarily involved in the recent case of *Muhlker* v. *N. Y. & H. R. Co.* (1903) 173 N. Y. 549. A railway company operating its road in the streets of New York City was compelled to elevate its tracks on a steel viaduct, the cost of construction being met equally by the city and the company. The act of the legislature was mandatory. The erection of the viaduct deprived the plaintiff of light and air and his action was brought to recover for the damage sustained. The court refused a recovery on the ground that, as the act was mandatory and constitutional, the defendant was a mere passive instrument in the hands of the State. In order for the legislative mandate to be valid it must first be constitutional and for this it must appear that property is not taken. Inferentially the court decided that it was not, though an important line of cases in New York beginning with *Story* v. *N. Y. Elev. R. Co.* (1882) 90 N. Y. 123 are dismissed as inapplicable. The Story case squarely decided that where a railroad under the permission of the legislature builds an elevated structure in the street it takes property under the New York Constitution Art. I, § 6. The court, in the principal case, disposes of this and other decisions of the kind by saying that in those cases the act was permitted and not commanded. Obviously here is a distinction without a difference for what the State cannot permit it cannot command. The result of the principal case is to cast doubt upon the Elevated Railroad Cases and to draw by a species of legal intuition, the distinction between an act which unauthorized would be a nuisance on the one hand and the taking of property on the other. It seems apparent

that the Story case ignored this distinction and the resulting anomalies in the law of New York have already been pointed out in 2 COLUMBIA LAW REVIEW 158.

Broadly speaking, a nuisance interferes with the use and enjoyment of property, while to take property one must have the act of physical prehension *Edwards* v. *Boston* (1871) 108 Mass. 535 or, what falls perhaps a little short of this, the complete deprivation of the use of property *Pumpelly* v. *Green Bay Co.* (1871) 13 Wall. 166.

PURGING OF CONTEMPTS BY OATH.—The recent case *in re Shachter* (D. C., N. D. Ga. 1902) 119 Fed. 1010, decides that the mere oath of a bankrupt that he has turned over all his property to the receiver in bankruptcy, is not sufficient to purge his contempt, where the facts before the court show clearly that he has had property in his possession, which he has failed to account for.

The decision is in accord with the weight of authority in this class of cases. *In re Salkey* (C. C., Ill., 1875) 21 Fed. Cas. 239; *in re Purvine* (C. C. A., Tex. 1899) 96 Fed. 192; *in re McCormick* (D. C., S. D. N. Y. 1899) 97 Fed. 566; *in re Schlesinger* (C. C. A., N. Y. 1900) 102 Fed. 117, but it calls for an examination into and explanation of the question of purging of contempts by oath. The rule, as generally stated is, that in law the contempt is purged by oath, but that in equity it is not. 3 COLUMBIA LAW REVIEW 45; *King* v. *Vaughan* (1780) 2 Doug. R. 516; *Burke* v. *State* (1874) 47 Ind. 528. In discussing contempts, it is necessary, as pointed out in 3 COLUMBIA LAW REVIEW, *supra*, to distinguish clearly between those which are criminal and those which are civil. It must be true that in courts of law the criminal contempt alone was known originally, for those courts could not act *in personam* in the civil action brought to enforce a suitor's rights. The civil contempt, therefore, with its process of attachment, distinguished from the criminal contempt, in that it was brought to enforce the suitor's rights, had its origin in some other tribunal, though there is doubt as to its exact source. The most satisfactory explanation and the one most consistent with the development of the contempt, is that it came from the civil law through the Ecclesiastical Courts and the Chancery. Langdell's Summary of Equity Pleading, p. 30. But whether this is so or not, the distinction, above pointed out, namely, that the imprisonment for the civil contempt is to secure the suitor his rights, while that for the criminal contempt is to vindicate the dignity of the court, has always existed and still exists, although the process to-day is the same in both cases. Criminal contempts, therefore, being a mild form of treason, originally against the king, and later disrespect of or disobedience to the king's judges, were really crimes and punishable as such. The contemnor, however, by the process, borrowed from the civil law, as above suggested, was put to his oath to answer certain interrogatories, when the contempt was "constructive," that is not in the presence of the court. As to this form of proceeding, Blackstone says, 4 Black. Comm. 287, 288: "It cannot have escaped the attention of the reader that this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance, and seems, indeed, to have been derived to the